

# Meshbesher & Spence

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L A W Y E R S

1616 Park Avenue, Minneapolis, MN 55404 | P: 612-339-9121 | F: 612-339-9188 | [meshbesher.com](http://meshbesher.com)

Genevieve M. Zimmerman  
Partner  
[gzimmerman@meshbesher.com](mailto:gzimmerman@meshbesher.com)

Paralegal:  
Holly M. Sternquist  
[hsternquist@meshbesher.com](mailto:hsternquist@meshbesher.com)

February 11, 2019

*Via CM/ECF and Email* – [JoanEricksen\\_Chambers@mnd.uscourts.gov](mailto:JoanEricksen_Chambers@mnd.uscourts.gov)  
[Schultz\\_Chambers@mnd.uscourts.gov](mailto:Schultz_Chambers@mnd.uscourts.gov)

Hon. Joan N. Ericksen  
Judge, United States District Court  
District of Minnesota  
12W U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Hon. David T. Schultz  
United States District Court  
District of Minnesota  
9E U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Re: MDL 2666: *In re: Bair Hugger Forced Air Warming Products Liability Litigation*

Dear Judge Ericksen and Magistrate Judge Schultz:

Plaintiffs respectfully request leave of Court to conduct additional discovery related to Defendants' motion for reconsideration of *Daubert* and summary judgment on general causation based upon new evidence. Dkt. No. 1024. Despite defense counsel's representation to the Court that the motion would not be based on testimonial evidence or affidavits,<sup>1</sup> the motion relies on a report from Dr. Borak issued in *Axline*. Plaintiffs will be conducting a limited deposition of Dr. Borak this Friday, February 15, 2019, less than a week before our deadline to respond to Defendants' motion for reconsideration on a dispositive issue impacting the entire MDL. Given

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<sup>1</sup> See Dkt. No. 1727 (Transcript, Motions Hearing, 1/24/19, 20:22-21:8) (THE COURT: Will 3M be submitting new documents or testimony or disclosures by experts that have not been previously produced to this Court? MS. YOUNG: No, Your Honor. THE COURT: Okay. MS. YOUNG: There is not, there is no -- we don't have access to and we don't know of any preliminary results from the Rio [sic] study, which Ms. Zimmerman is talking about. We'll be referring to published literature, the International Consensus statement from 2018, the genes [sic] studies, but no testimonial evidence, affidavits, new documents.).

**Meshbesher & Spence**  
LAWYERS

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the potential consequence of the motion, Plaintiffs would like to conduct discovery on the “new information” underlying the motion.

Specifically, Plaintiffs would like to ensure all requests for production of documents previously served have been properly supplemented, and to potentially serve additional requests for production specific to this “new information.” As Defendants insisted throughout 2016, Plaintiffs would like to depose one or more of the authors of the so-called “Jeans” study<sup>2</sup> (Jeans, E.; Holleyman, R.; Tate, D.; Reed, M.; Malviya A.). Plaintiffs respectfully request the opportunity to request these study authors make themselves available for a deposition as soon as possible. Plaintiffs also request ten days following the completion of any study author’s depositions for our medical experts (Drs. Jarvis, Samet, and Stonnington) to have the opportunity to review and respond to the “new information,” given Defendants’ reliance on the same in moving to exclude their expert opinions.

Finally, Plaintiffs would respectfully request an extension of time to complete our responsive briefing in light of the additional discovery. The response opposing Defendants’ motion is due on February 21, 2019. No hearing date has yet been scheduled. Plaintiffs would respectfully request that the responsive brief deadline be reset to two weeks after the completion of any depositions.

We sought Defendants’ consent to provide us additional time, as we have agreed on each and every instance they have requested additional time from us. Defendants declined to agree to the request.

Respectfully submitted,

  
Genevieve M. Zimmerman

GMZ/hms

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<sup>2</sup> Jeans E, Holleyman R, Tate D, Reed M, Malviya A., *Methicillin sensitive staphylococcus aureus screening and decolonization in elective hip and knee arthroplasty*, J INFECT (2018).